

Ong Hooi Beng & Ors v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
K-05-298-12 OF 2012, K-05-299-12 OF 2012 AND K-05-300-12 OF
2012

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AZIAH ALI, TENGKU MAIMUN AND ABDUL RAHMAN SEBLI JJCA
30 JANUARY 2015

*Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(c) — Offence of
doing or offering to do an act preparatory to or for purpose of drug trafficking
— Factory used as clandestine drug processing laboratory to produce
methamphetamine — Whether no proper appreciation of the defence — Whether
trial judge erred in failing to draw adverse inference — Whether there were doubts
on identity of drug exhibits — Whether break in chain of evidence relating to
exhibits*

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*Evidence — Presumptions — Adverse inference — Failure of prosecution to call
a witness — Whether adverse inference ought to be drawn — Whether amounted
to withholding or suppression of material evidence — Whether adverse inference
may be drawn to whole length and breadth of prosecution case — Whether resulted
in a gap in prosecution case — Evidence Act 1950 s 114(g)*

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The three appellants (who were father, son and daughter respectively) were charged with an offence of doing an act preparatory to trafficking in dangerous drugs, an offence under s 39B(1)(c) of the Dangerous Drugs Act 1952. One ASP Howe Sye Eng ('SP7') had led a police party to raid a factory under the name of Zmas Synergy Sdn Bhd which was suspected to be used as a clandestine drug processing laboratory. SP7 and his party broke into the factory and found the accused there. The reactors in the factory were operational. The following day, the chemist ('SP6') visited the factory. SP6 found 368,126.26g of methamphetamine in the factory. SP6's evidence was that the factory was used as an illegal laboratory to produce methamphetamine. The appellants' defence was that they did not know that they were processing drugs. They thought they were manufacturing perfume, cosmetic products, slimming products, recycled oil, biodiesel oil and 'minyak gaharu'. All three denied any involvement in drug processing. The learned trial judge ('judge') found the defence to be a mere denial and accordingly found the appellants guilty as charged. The appellants appealed on the following grounds: (i) that there was no proper appreciation of the defence by the judge; (ii) that the judge erred in failing to draw adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for failing to call one Tan Seong Hooi ('SD7') at the prosecution's case; and (iii) that there were doubts on the identity of the

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- A drug exhibits. SD7 had testified for the defence that the first appellant was his proxy in Zmas Synergy Sdn Bhd and that the factory was manufacturing recycled oil, biodiesel, 'ubat kurus badan' and 'ubat cantik'. However, the darker side of SD7 that emerged during the trial was that on the same date that the appellants were arrested at the factory, SD7 was arrested elsewhere on suspicion of being the 'Ketua Sindiket' of a drug trafficking syndicate based in the same factory. For this he was detained pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. With regards to the doubts on the identity of the drug exhibits, the appellants claimed that the basis of the complaint was that the gross weight of the drugs was 184,500g but by the time they reached the chemist the weight had ballooned to 368,126.26g.

Held, dismissing the appeal and affirming the conviction and sentence:

- D (1) SP6's evidence was not challenged at all in cross-examination and was therefore deemed to be admitted (see para 8); *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.
- E (2) Whether or not a defence amounts to a mere denial is to be determined not by the fact that it is coupled with an explanation but by the nature of the explanation. The appellants' defence was merely tailored to counter and to deflect the prosecution's evidence that the factory was used as a clandestine drug processing laboratory. Traces of methamphetamine were found on their fingernails, hair and clothing, were compelling evidence which showed that they were actively involved in processing the drug at the factory (see paras 22–23).
- F (3) In view of SD7's deep involvement in the factory's clandestine operation and the nature of his relationship with the first appellant, it is only natural that he would try to save his proxy the first appellant and his two children from the fatal consequences of their involvement in this illegal activity. Under these circumstances the learned trial judge was on solid ground when he found SD7 to be an unreliable witness, made worse by his negative demeanour while giving evidence (see para 44).
- G (4) The judge did not consider the cautioned statements of the second and third appellants but this omission was not fatal because even if the judge had considered the statements he would have arrived at the same verdict of guilty. On at least one material issue, what they said in their cautioned statements and what they said in court was contradictory and irreconcilable (see para 45).
- H (5) It is not a mandatory requirement that every time the prosecution fails to call a witness, an adverse inference ought to be drawn against them. It is only when the prosecution withholds or suppresses material evidence that the inference may be drawn. Even then the unfavourable inference to be drawn is to be confined to the particular evidence that is withheld or

suppressed. It cannot extend to the whole length and breadth of the prosecution case unless it relates to an essential element of the charge resulting in a total collapse of the prosecution case. SD7 was not an essential witness to the unfolding of the narratives on which the prosecution case was based. Further, even without SD7's evidence the prosecution already had sufficient evidence to establish a prima facie case against all the appellants. Thus the failure to call him as a prosecution witness was of no consequence as it did not result in a gap in the prosecution case (see paras 56, 58–59).

- (6) What was of critical importance was whether the drug exhibits produced in court were the same drug exhibits recovered from the factory. The combined evidence of SP6, SP7 and SP15 showed beyond any reasonable doubt that the drug exhibits that SP6 found to be 368,126.26g of methamphetamine were the same drug exhibits that were seized from the factory. There was no challenge to their evidence and hence their evidence could not be disputed. Thus, the appellants could not now say that there had been a break in the chain of evidence relating to the exhibits (see paras 70 & 72).

[Bahasa Malaysia summary]

Ketiga-tiga perayu (yang masing-masing merupakan bapa, anak lelaki dan anak perempuan) telah dituduh kerana kesalahan melakukan suatu perbuatan bagi penyediaan untuk mengedar dadah berbahaya, satu kesalahan di bawah s 39B(1)(c) Akta Dadah Berbahaya 1952. ASP Howe sye Eng ('SP7') telah mengetuai pasukan polis untuk menyerbu sebuah kilang di bawah nama Zmas Synergy Sdn Bhd yang disyaki telah digunakan sebagai makmal rahsia memproses dadah. SP7 dan pasukannya telah memasuki kilang itu dan menemui tertuduh di situ. Reaktor dalam kilang itu beroperasi. Keesokan hari, ahli kimia ('SP6') telah melawat kilang itu. SP6 menemui 368,126.26g dadah methamphetamine dalam kilang itu. Keterangan SP6 adalah bahawa mereka tidak mengetahui yang mereka sedang memproses dadah. Mereka fikir mereka membuat minyak wangi, produk kosmetik, produk pelansingan badan, minyak kitar semula, minyak biodiesel dan minyak gaharu. Ketiga-tiga mereka menafikan apa-apa penglibatan dalam pemprosesan dadah. Hakim perbicaraan yang bijaksana ('hakim') mendapati pembelaan itu penafian semata-mata dan sewajarnya mendapati perayu-perayu bersalah sepertimana dituduh. Perayu-perayu telah merayu atas alasan-alasan berikut: (i) bahawa tiada pemahaman wajar tentang pembelaan itu oleh hakim tersebut; (ii) bahawa hakim tersebut terkhilaf kerana gagal membuat inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pendakwaan kerana gagal memanggil Tan Seong Hooi ('SD7') dalam kes pendakwaan; dan (iii) bahawa terdapat keraguan tentang identiti ekshibit dadah. SD7 telah memberi keterangan bagi pihak pembelaan bahawa perayu pertama ialah proksinya dalam Zmas Synergy Sdn Bhd dan bahawa kilang itu membuat minyak kitar

- A semula, biodiesel, ubat kurus badan dan ubat cantik. Walau bagaimanapun, sikap buruk SD7 yang timbul semasa perbicaraan adalah bahawa pada hari yang sama perayu-perayu ditangkap di kilang itu, SD7 telah ditangkap di tempat lain kerana disyaki menjadi 'Ketua Sindiket' sindiket pengedaran dadah yang berpusat dalam kilang sama. Untuk itu dia telah ditahan menurut s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985. Berhubung keraguan tentang identiti ekshibit dadah, perayu-perayu mendakwa bahawa asas aduan itu adalah berat kasar dadah itu ialah 184,500g tetapi apabila dadah itu sampai kepada ahli kimia beratnya telah bertambah kepada 368,126.26g.

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Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

- (1) Keterangan SP6 tidak dicabar langsung dalam pemeriksaan balas dan dengan itu dianggap telah diterima (lihat perenggan 8); *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212.
- D
- (2) Sama ada atau tidak pembelaan itu membentuk penafian semata-mata perlu ditentukan bukan oleh fakta yang ia besertakan penjelasan tetapi oleh sifat penjelasan itu. Pembelaan perayu-perayu hanya disesuaikan untuk menangani dan memesongkan bukti pendakwaan bahawa kilang itu digunakan sebagai makmal rahsia memproses dadah. Kesan dadah methamphetamine ditemui pada jari-jari, rambut dan pakaian mereka, yang merupakan bukti yang menarik bagi menunjukkan bahawa mereka terlibat dengan aktif dalam pemprosesan dadah itu di kilang tersebut (lihat perenggan 22–23).
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- (3) Memandangkan penglibatan mendalam SD7 dalam operasi haram kilang itu dan jenis hubungannya dengan tertuduh pertama, ia hanyalah semulajadi untuk dia cuba menyelamatkan proksinya perayu pertama dan dua anak-anaknya daripada akibat yang memudaratkan dalam penglibatan mereka dalam aktiviti haram ini. Dalam keadaan tersebut hakim perbicaraan yang bijaksana mempunyai alasan kukuh apabila beliau mendapati SD7 ialah saksi yang tidak boleh dipercayai, lebih buruk lagi disebabkan sikap negatifnya semasa memberi keterangan (lihat perenggan 44).
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- (4) Hakim tidak mengambil kira kenyataan-kenyataan beramaran perayu-perayu kedua dan ketiga tetapi peninggalan ini tidak memudaratkan kerana meskipun hakim tersebut telah mengambil kira kenyataan-kenyataan itu beliau perlu membuat keputusan bersalah yang sama. Sekurang-kurangnya satu isu utama, apa yang dinyatakan oleh mereka dalam kenyataan beramaran mereka dan apa yang dinyatakan oleh mereka dalam mahkamah adalah bercanggah dan tidak selari (lihat perenggan 45).
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- (5) Ia bukan keperluan mandatori bahawa setiap kali pendakwaan gagal

memanggil saksi, satu inferens bertentangan patut dibuat terhadap mereka. Hanya apabila pendakwaan menahan atau menyekat keterangan material yang mana inferens itu boleh dibuat. Namun begitu inferens yang tidak menyebelahi yang dibuat perlu terhadap kepada keterangan tertentu yang ditahan atau disekat. Ia tidak boleh dilanjutkan untuk sepanjang kes pendakwaan kecuali ia berkaitan elemen penting pertuduhan yang mengakibatkan kegagalan kes pendakwaan. SD7 bukan saksi penting kepada kejadian yang berlaku yang menjadi asas kes pendakwaan. Selanjutnya, meskipun tanpa keterangan SD7 pendakwaan telahpun mempunyai keterangan mencukupi untuk membuktikan kes prima facie terhadap kesemua perayu-perayu. Oleh itu kegagalan untuk memanggilnya sebagai saksi pendakwaan tidak memberi kesan kerana ia tidak menyebabkan jurang dalam kes pendakwaan (lihat perenggan 56, 58–59).

- (6) Apa yang penting adalah sama ada ekshibit dadah yang dikemukakan dalam mahkamah adalah ekshibit dadah sama yang ditemui dari kilang tu. Gabungan keterangan SP6, SP7 dan SP15 menunjukkan melampaui apa-apa keraguan munasabah bahawa ekshibit dadah yang mana ditemui SP6 sebagai 368,126.26g dadah methamphetamine adalah ekshibit dadah sama yang dirampas dari kilang itu. Tiada cabaran kepada keterangan mereka dan justeru keterangan mereka tidak boleh dipertikaikan. Oleh itu, perayu-perayu sekarang tidak boleh mengatakan bahawa terdapat pematahan dalam rantaian keterangan berkaitan ekshibit-ekshibit itu (lihat perenggan 70 & 72).]

Notes

For cases on adverse inference, see 7(2) *Mallal's Digest* (5th Ed, 2015) para 2594.

For cases on s 39B(1)(c), see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 660–663.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)

Al Bakhtiar bin Ab Samat v PP [2012] 4 MLJ 713; [2012] 7 CLJ 458, CA (refd)

Antonio Dias Caldeira v Frederick Augustus Gray [1936] 1 MLJ 110, PC (refd)

Balachandran v PP [2005] 2 MLJ 301, FC (refd)

Chua Keem Long v PP [1996] 1 SLR 510, HC (refd)

DA Duncan v PP [1980] 2 MLJ 195, FC (refd)

Dilworth and Others v The Commissioner of Stamps [1899] AC 99, PC (refd)

Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)

Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)

Mahbub Shah v Emperor AIR 1945 PC 118 (folld)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

- A** *PP v Ling Tee Huah* [1982] 2 MLJ 324 (refd)
PP v Tan Gong Wai & Anor [1985] 1 MLJ 355; [1984] 1 LNS 137 (refd)
Powell and Wife v Streatham Manor Nursing Home [1935] AC 243, HL (refd)
Rex v Low Toh Cheng [1941] 1 MLJ 1 (refd)
Siti Aishah bt Sheikh Abd Kadir v PP [2013] 6 MLJ 86; [2014] 1 CLJ 1058,
B CA (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)
Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)
Watt or Thomas v Thomas [1947] AC 484, HL (refd)
C *Wong Swee Chin v PP* [1981] 1 MLJ 212, FC (refd)

Legislation referred to

- Dangerous Drugs Act 1952 ss 2, 37(da), (da)(xvi), 39B, 39B(1), 39B(1)(c),
(3), First Schedule (Part III)
D Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1)
Evidence Act 1950 s 114(g)
Penal Code s 34

Appeal from: Criminal Trial No 45–19 of 2007 (High Court, Alor Setar)

- E** *Ranjit Singh Dhillon (J Kaur, Ranjit & Assoc) for the appellant.*
Asmah bt Musa (Deputy Public Prosecutor, Attorney General's Chambers) for the
respondent.

F Abdul Rahman Sebli JCA:

- G** [1] In the High Court at Alor Setar Kedah the three appellants together with three others were charged with an offence of doing an act preparatory to trafficking in dangerous drugs, an offence under s 39B(1)(c) of the Dangerous Drugs Act 1952 ('the DDA'). The charge against them is as follows:

- H** Bahawa kamu pada 09/07/2006 jam lebih kurang 4.00 petang, di Kilang ZMAS SYNERGY Sdn Bhd, Plot 935, Lorong Makmur 13/1, Taman Makmur, Lunas, dalam Negeri Kedah Darul Aman, dalam lanjutan dari niat bersama, telah melakukan suatu perbuatan sebagai persediaan bagi tujuan mengedar dadah berbahaya iaitu Methamphetamine seberat 368,126.26 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(c), ADB 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksaan.

- I** [2] The appellants were the first, third and sixth accused respectively at the trial. They are in fact father, son and daughter in that order. At the conclusion of the trial all three were found guilty and sentenced to death. The other three accused were acquitted and discharged as the learned trial judge accepted their defence.

[3] The facts in so far as they are relevant for purposes of this appeal are as follows. On 9 July 2006 at about 4pm ASP Howe Sye Eng ('SP7') of the Bukit Aman police led a party of 18 personnel to conduct a raid on a factory under the style and name of Zmas Synergy Sdn Bhd which was suspected to be used as a clandestine drug processing laboratory. When SP7 and his party arrived, the gate was closed but not locked. However, to gain entry to the office they had to break the glass door as it was closed.

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[4] Once inside the office they arrested three of the six accused in the living hall including the third appellant. The first appellant was arrested by another officer at the platform where 18 reactors were located while the second appellant was arrested in a room on the ground floor of the factory. The other accused was arrested near the reactor platform on the lower floor. Other than these six persons there were no other persons inside the factory.

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[5] According to SP7 the reactors in the factory were operational as he could hear the system running. The chemist's (SP6) testimony in this regard is that each of these 18 reactors was equipped with a boiler, cooling system, vacuum and scrubber. SP7 then proceeded to carry out checks in the factory in the presence of all the accused and seized items as detailed in the search lists at exhs P198–P204 which he himself prepared. Altogether 110 items were seized by SP7 from the factory including personal items belonging to the six accused persons.

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[6] The following day, ie on 10 July 2006 the chemist Shaharudin bin Hassan ('SP6') visited the factory to carry out inspection accompanied by the investigating officer DSP Ismail bin Hj Abu ('SP15'). It took him six days to carry out the inspection. What he did and found at the factory during the six day inspection is described in detail in his oral evidence in court and in his chemist report at exh P157 (pp 788–812 of the appeal record).

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[7] From the samples that SP6 took from the factory he found the various items to contain 368,126.26g of methamphetamine, a dangerous drug listed in the First Schedule (Part III) of the DDA. The crucial part of SP6's evidence is that the factory was used as an illegal laboratory to produce methamphetamine. He had explained both in his oral evidence and in his chemist report why he came to the conclusion that the factory was used for such activity. For ease of reference we reproduce below his explanation at p 74 of the cross-appeal record (vol 1):

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Daripada sampel-sampel yang telah dianalisis, bahan-bahan kimia dan kelengkapan yang ditemui, maka saya berpendapat bahawa:

- (1) Premis kilang tersebut telah digunakan sebagai makmal haram untuk membuat/memproses dadah methamphetamine berdasarkan:

- A** (i) Penemuan bahan kimia phenylacetone juga dikenali sebagai *1-phenyl-2-propanone* atau singkatannya *P-2-P* iaitu prekursor penting dalam penghasilan methamphetamine.
- (ii) Penemuan *alpha-phenylacetoacetonitrile* sejenis bahan kimia yang digunakan untuk menghasilkan *phenylacetone* (P-2-P).
- B** (iii) Penemuan bahan-bahan kimia dan barangan lain yang diperlukan untuk menghasilkan dadah methamphetamine seperti *sulphuric acid*, *ethyl alcohol*, *methanol*, *dichloromethane*, *mercuric chloride*, *aluminium*, *methylamine* dan *sodium sulphate*.
- C** (iv) Terdapatnya reaktor-reaktor yang dilengkapi dengan boiler, system penyejuk, vakum dan skruher yang mempunyai kesan-kesan *methamphetamine*, *phenylacetone*, *methylamine* dan *aluminium*.
- (v) Terdapatnya alat pengempar yang berisi bahan berhablur yang mengandungi methamphetamine.
- D** (vi) Penemuan bahan-bahan berhablur yang mengandungi methamphetamine.
- (vii) Penemuan campuran bahan-bahan berhablur dan cecair yang mengandungi methamphetamine.
- E** (viii) Penemuan sisa-sisa cecair dan mendakan putih yang mengandungi methamphetamine.
- (ix) Penemuan phenylacetone dalam sisa (*waste*) pelarut *diethyl ether* dan larutan akuas *sulphuric acid*.
- F** (x) Alat-alat kelengkapan lain yang mempunyai kesan-kesan methamphetamine.
- (2) Proses utama penghasilan methamphetamine adalah daripada tindakbalas *alpha-phenylacetoacetonitrile* dengan *sulphuric acid* untuk menghasilkan *phenylacetone* (P-2-P). Bahan ini akan bertindak dengan *methylamine* dengan kehadiran *mercuric chloride* serta logam aluminium bagi menghasilkan *methamphetamine*.
- G** (3) Penemuan bahan-bahan kimia lain selain dari tersebut di atas boleh digunakan bagi penghasilan:
- H** (i) Phenylacetone (P-2-P).
- (ii) Methamphetamine.
- (iii) Amphetamine Type Stimulants lain seperti 3,4-methylenedioxymethylamphetamine (MDMA), 4-bromo-2,5-dimethoxyphenethylamine (2C-B).
- I**

[8] This part of SP6's evidence was not challenged at all in cross examination and is therefore deemed to be admitted: *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC). In any event expert opinion must be challenged by

another expert. The challenge in cross-examination if at all of an expert witness is merely to lay the groundwork for the evidence of another expert, if called.

A

[9] The word 'manufacture' is defined in *Black's Law Dictionary*, (8th Ed) 2004 as follows:

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A thing that is made or built by a human being, as distinguished from something that is a product of nature; esp. any material form produced by a machine from an unshaped composition of matter.

[10] Under s 2 of the DDA the word 'manufacture' in relation to a dangerous drug includes the following:

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- (a) the making, producing, compounding and assembling of the drug;
- (b) the making, producing, compounding and assembling a preparation of the drug;
- (c) the refining or transformation of the drug into another dangerous drug; and
- (d) any process done in the course of the foregoing activities.

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[11] Trafficking on the other hand is defined as to include the doing of any of the following acts, that is to say, manufacturing, importing, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of the DDA or the regulations made thereunder.

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[12] In *Dilworth and Others v The Commissioner of Stamps* [1899] AC 99 the Privy Council acknowledged that the word 'includes' could be used in two ways, ie either exhaustively or non-exhaustively depending on the context in which it is used. In the context of the definition of trafficking in s 2 of the DDA we are of the view that the word 'includes' is intended to be used non-exhaustively as the mischief behind the definition is to strike down any form of trafficking activity, and the most effective way to achieve that purpose would be to leave open the categories of acts that would amount to trafficking.

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[13] There are three distinct offences created by s 39B(1) of the DDA. Firstly trafficking under para (a), secondly offer to traffic under para (b) and thirdly to do or offer to do an act preparatory to trafficking under para (c). The gravamen of the offence under para (c) is the act that is preparatory to trafficking. Thus the key ingredient of the offence is the preparatory act itself rather than the actual act of trafficking, which is a separate offence under para (a).

I

A [14] It is for the prosecution to decide under which paragraph of s 39B(1) an accused person should be charged with. In the present case the act that the appellants were alleged to have done in preparation for trafficking was their act of processing and producing the drug. For all practical purposes this was also an act of trafficking by definition, ie ‘manufacturing’.

B [15] The amount of drug involved is staggering. It is more than 7000 times the prescribed minimum to trigger the presumption of trafficking under s 37(da)(xvi) of the DDA. This was clearly a large scale production of illicit drug. It could only be for the purpose of trafficking. The photo of the building
C at p 100 of the additional record of appeal II shows a typical factory building and the photos of the inside of the building show a typical factory setting. The 18 reactors can be seen in photos 25–27 at pp 98–99 of the same record.

D [16] The primary facts established by the prosecution at the close of its case and which formed the basis for the learned trial judge to call for the appellants’ defence were the following:

- (a) at the time of their arrest all three appellants were inside the factory where the drugs and drug manufacturing apparatus were found;
- E (b) the factory was used as a clandestine laboratory to produce methamphetamine;
- (c) machines and equipment used for producing methamphetamine were found inside the factory and were functional;
- F (d) chemicals, substances and utensils used for manufacturing methamphetamine were found inside the factory;
- (e) traces of methamphetamine were found on the appellants’ fingernails, hair and clothing which indicated that they had knowledge of the drugs and were involved in their production; and
- G (f) the first appellant had arranged with SP19 for delivery to the factory of chemicals used for manufacturing methamphetamine.

H [17] When called upon to state their defence the appellants elected to give evidence on oath. The defence common to each of them was that they did not know that they were processing drugs. They thought they were manufacturing perfume, cosmetic products, slimming products, recycled oil, biodiesel oil and ‘minyak gaharu’. All three denied any involvement in drug processing.

I [18] Having considered the appellants’ explanation the learned trial judge found the defence to be a mere denial, citing *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 and *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195. He accordingly found each of them guilty as charged.

[19] Before us learned counsel for the appellants raised three grounds of appeal namely: A

- (a) there was no proper appreciation of the defence by the learned trial judge;
- (b) the learned judge erred in failing to draw adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for failing to call one Tan Seong Hooi ('SD7') at the prosecution's case; and B
- (c) there were doubts on the identity of the drug exhibits.

[20] We shall start with the first ground. In his written submissions learned counsel for the appellants reproduced a certain portion of the grounds of judgment to support his contention that there was no proper appreciation of the defence by the learned trial judge. To better understand the issue and to provide context we think it is necessary to reproduce below the whole of the impugned part of the judgment: C
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3. Tertuduh Pertama, Ketiga dan Keenam gagal menyangkal kes prima facie pendakwaan;

4. Pembelaan Tertuduh Pertama, Ketiga dan Keenam adalah penafian semata-mata. Dalam kes *PP v Ling Tee Huah* (1982) 2 MLJ 324 di mukasurat 324 memutuskan: E

A mere denial without proof to reasonably dislodge the prosecution is (*sic*) evidence is not sufficient.

Mahkamah Persekutuan dalam kes *DA Duncan v PP* (1980) 2 MLJ 195 memutuskan: F

This denial did not ... a doubt on the prosecution case against the Appellant.

5. Tertuduh Pertama adalah pengarah syarikat Zmas Synergy dan Tertuduh Keenam adalah pemegang saham syarikat tersebut. Bagaimana mereka tidak tahu apa yang dikeluarkan oleh kilang tersebut. Tertuduh ketiga pula adalah anak kandung Tertuduh Pertama dan abang kepada Tertuduh Keenam; G

6. Sehubungan dengan itu, kesan-kesan methamphetamine yang ditemui di pakaian, kuku dan rambut mereka tidak dijelaskan;

7. Keterangan SD7 Tan Seong Hooi adalah meragukan. Mahkamah tidak menerima keterangannya sebagai Saksi yang bercakap benar berdasarkan demeanour dan latarbelakangnya. SD7 tahu kilang itu mengeluarkan dadah berbahaya. Berdasarkan pengamatan Mahkamah semasa dia memberi keterangan demeanour sangat meragukan. Begitu juga Tertuduh Pertama, Tertuduh Keenam dan juga anak lelakinya Tertuduh Ketiga mengetahui kilang itu mengeluarkan dadah berbahaya berdasarkan penemuan kesan methamphetamine di baju, kuku dan rambut mereka; H
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8. Pembelaan ketiga-tiga Tertuduh Pertama, Ketiga dan Keenam tidak menimbulkan was-was yang munasabah terhadap kes prima facie pendakwaan

- A seperti diputuskan oleh kes Mahkamah Persekutuan *Balachandran v PP* (2005) 1 CLJ 85;
9. Demeanour ketiga-tiga Tertuduh semasa memberi keterangan pembelaan sangat meragukan. Dalam kes *Khoon Chye Hin v PP* (1961) 27 MLJ 105 di muka surat 107, Mahkamah Persekutuan menyatakan:
- B if a witness tells lies on one or two points, then it is clear that he is not a reliable witness.
10. Kes prima facie pendakwaan kekal melampaui keraguan yang munasabah terhadap Tertuduh Pertama, Ketiga dan Keenam.
- C
- D [21] The first complaint raised by the appellants in relation to this ground is that the learned trial judge was wrong in finding the defence to be a mere denial, relying on the judgments of this court in *Al Bakhtiar bin Ab Samat v Public Prosecutor* [2012] 4 MLJ 713; [2012] 7 CLJ 458 and *Siti Aishah bt Sheikh Abd Kadir v Public Prosecutor* [2013] 6 MLJ 86; [2014] 1 CLJ 1058. It was submitted that the defence could not be regarded as a mere denial as it was coupled with an explanation.
- E [22] In our opinion whether or not a defence amounts to a mere denial is to be determined not by the fact that it is coupled with an explanation but by the nature of the explanation. A denial may well be coupled with an explanation but if the explanation is merely to deflect the prosecution's evidence without answering the real questions in controversy to reasonably dislodge the
- F prosecution's evidence it remains a mere denial for what it is worth.
- G [23] In the instant case it is obvious that the appellants' defence was tailored to counter and to deflect the prosecution's evidence that the factory was used as a clandestine drug processing laboratory and that traces of methamphetamine were found on their fingernails, hair and clothing, compelling evidence which shows that they were actively involved in processing the drug at the factory.
- H [24] As against these highly incriminating evidence, there is nothing in the appellants' explanation to show that the chemicals and substances found in the factory were used for manufacturing cosmetic products et cetera and not drugs. Nor has it been explained how the traces of methamphetamine came to be found on their fingernails, hair and clothing. Neither has any explanation been given to the chemist's evidence that the factory was used as an illegal laboratory to process methamphetamine.
- I [25] If, as claimed, they thought they were producing cosmetic and slimming products amongst others, the appellants have not explained what exactly were these products that they were producing. No sample was produced. In fact the first appellant admitted in cross-examination that he had

no expertise in the production of perfume, cosmetic and slimming products. If that be the case, how then could he (and for that matter the other two appellants) entertain the belief that they were producing these products? In the absence of such explanation the learned trial judge was right in our view to treat the defence as a mere denial as it did not provide answers to those incriminating evidence.

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[26] We are not suggesting of course that the burden was on the appellants to prove their case or that an adverse inference ought to be drawn against them. All we are saying is that with those damning evidence staring them in the eyes, the least that was expected of the appellants was to show to the court that their belief was reasonably true and that they had no reason to suspect that they were producing drugs. The following passage in the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 is pertinent:

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Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt *the other is the evidential burden on the accused to raise a reasonable doubt*. Both these burdens can only be fully discharged at the end of the whole case when the defence had closed its case. Therefore, a case can be said to have been proved beyond reasonable doubt only at the conclusion of a trial upon a consideration of all evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. (Emphasis added.)

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[27] Perhaps the point is best illustrated by the following observation by Edgar Joseph Jr J (as he then was) in *Public Prosecutor v Tan Gong Wai & Anor* [1985] 1 MLJ 355; [1984] 1 LNS 137:

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I realise that no adverse inference against an accused person may be drawn by reason of his failure to call any witness or indeed to even give evidence on his own behalf for all he has to do is to raise a reasonable doubt: (*Goh Ah Yew v Public Prosecutor* [1949] MLJ 150). However, the failure to call any particular witness is a matter which the court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence (*Regina v Gallagher* [1974] 1 WLR 1204; *Public Prosecutor v Lira Kuan Hock* [1967] 2 MLJ 114115; *Tay Choo Wah v Public Prosecutor* [1976] 2 MLJ 95100.)

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[28] The decision in the above case was reversed by the Federal Court but the observation quoted above was left untouched. On our part we consider it to be a correct statement of law. Even assuming for a moment that the appellants' defence cannot be regarded as a mere denial by reason of the explanation given, what is patently clear is that the learned trial judge rejected the defence explanation.

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A [29] In other words the learned trial judge disbelieved the appellants' claim that they did not know they were processing drugs. Undoubtedly this is a finding of fact that is dependent on the trial judge's assessment of the appellants' credibility as witnesses, which is primarily a matter for the trial judge: *Watt or Thomas v Thomas* [1947] AC 484487; *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] 1 MLJ 110111.

C [30] Having had the audio-visual advantage of seeing and hearing the appellants while they gave evidence, the learned trial judge was in the best position to assess their credibility and reliability, and certainly not us at the appellate stage who only have the benefit going through their evidence in cold print. It is true that the present day technology allows us to capture court proceedings so that we can always play back the audio-visual recordings to see for ourselves how the witnesses behaved or reacted to certain questions, but there is no substitute for seeing and hearing them first hand and in real time.

D [31] To entitle us to overturn the trial court's finding under such circumstances and substitute it with our own finding that the appellants were actually credible witnesses and that the belief that they entertained was in fact reasonably true, the burden is on the appellants to show that the finding is perverse and that the learned trial judge had failed to take proper advantage of his having seen and heard them giving evidence. We are not satisfied that the appellants have discharged that burden. In *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243; 104 LJKB 304; 152 LT 563; 79 Sol Jo 179; 51 TLR 289 Lord Wright in dealing with a similar issue said:

F Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but must be convinced that it is wrong'.

G [32] It was next argued that the learned trial judge was wrong in rejecting SD7's evidence based on his demeanour alone. Seventy three years ago in *Rex v Low Toh Cheng* [1941] 1 MLJ 1 Terrel Ag CJ had this to say on the subject:

H As to (4), a magistrate is entitled to disbelieve a witness and usually gives reasons for the opinion which he has formed, but a general reference to the demeanour of witnesses, without condescending to any particulars, gives rise to the suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of the evidence but to the probabilities, and which could not be supported on a detailed examination of the evidence.

I [33] This principle was reaffirmed by the High Court in *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110 where Raja Azlan Shah FJ (as His late Royal Highness then was) sitting as a High Court judge said:

Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility.

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[34] It was urged upon us that SD7's testimony, which according to learned counsel formed the backbone of the appellants' defence ought to have been given favourable consideration by the learned trial judge. It was submitted that the defence was not something that was kept up the appellants' sleeves as SD7's role had been laid out during the cross-examination of SP7 and SP16.

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[35] With due respect to learned counsel we find the argument to be fallacious. The fact that the defence case had been laid out during the cross examination of the prosecution witnesses does not mean that the defence is credible without more. It merely means that the defence version of events had been put to the relevant prosecution witnesses so as to prevent surprises at the trial: *AEG Carapiet v AY Derderian* AIR 1961 CAL 359. Whether the defence is credible or otherwise is entirely a matter for the trial judge to consider having regard to the evidence before the court.

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[36] The evidence of SD7 that is said to be favourable to the appellants was his evidence elicited through the following questions and answers in examination-in-chief:

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Q: Adakah pada bila-bila masa kamu beritahu Tertuduh Pertama bahawa kilang ini digunakan untuk proses dadah berbahaya?

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A: Tidak. Saya sendiri tidak tahu. Tahap pendidikan Tertuduh Pertama sangat rendah. Dia tidak tahu.

Q: Adakah Tertuduh Pertama hingga Keenam tahu kilang Zmas Synergy untuk proses syabu atau methamphetamine?

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A: Tidak tahu.

[37] Before we deal with SD7's evidence in more detail, we need to first of all correct what learned counsel had said with regard to the learned judge's observation on his demeanour. It is not true that the learned trial judge rejected SD7's evidence based on his demeanour alone. From the passages reproduced in para 20 above, the other reasons why the learned trial judge doubted the credibility of SD7 was due to his background ('latarbelakang') and his knowledge of the illegal activities taking place at the factory. We find these reasons to be strong basis for the learned trial judge to treat SD7's evidence with caution, in particular that part of his testimony that purports to support the appellants' defence of no knowledge.

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[38] Without a doubt Tan Seong Hooi (SD7) was a material witness not

- A only for the defence but ironically, as it turned out, for the prosecution as well. But first, who was he and what was his role in the whole scheme of things? At the trial he gave his profession as 'Charity Worker' in a Buddhist charitable organisation. His testimony was that the first appellant was his proxy in Zmas Synergy Sdn Bhd. He said he nominated the first appellant as proxy director in the company as he could not be a director himself due to health reasons and due to the fact that he was a bankrupt. According to him the first appellant as proxy director was paid a monthly salary of RM5,000 by the chairman of the company, a Taiwan national by the name of Chang Jui Ta.
- B
- C [39] It was SD7's evidence that the factory was manufacturing recycled oil, biodiesel, 'ubat kurus badan' and 'ubat cantik'. 'Minyak gaharu' that the 1st appellant mentioned in his evidence was conspicuously missing from the list. He said none of those arrested on 9 July 2006 knew that the factory was manufacturing syabu. We pause here to note that this is the part of SD7's evidence that the appellants' defence of no knowledge was pegged on. He went on to say that the frequency of his visit to the factory was four to five times a week. Judging from SD7's testimony, his involvement in the running of the factory is beyond dispute.
- D
- E [40] The darker side of SD7 that emerged during the trial was that on the same date that the three appellants and the three others were arrested at the factory, he was arrested elsewhere on suspicion of being the 'Ketua Sindiket' of a drug trafficking syndicate based in the same factory. Loosely translated 'Ketua Sindiket' means kingpin. For this he was detained pursuant to s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. This was not disputed and in fact expressly admitted. SD7 further admitted that he was a 'Bookie bola dan kuda' both before and after his arrest.
- F
- G [41] The detention order (D247) that was issued on the direction of the Deputy Minister of Home Affairs contained, amongst others the following statements of fact against SD7:
- H (1) Bahawa kamu adalah Ketua Sindiket pemprosesan Syabu yang mengandungi dadah berbahaya jenis Methamphetamine di makmal kilang ZMAS Synergy Sdn. Bhd., 935, Lorong Makmur 13/1, Taman Makmur, Lunas, Kedah sejak awal April 2006 hingga 8.7.2006 secara tidak berterusan.
- I (2) Bahawa kamu telah menggunakan khidmat ahli kimia dari Negara China serta pembantu-pembantu tempatan dalam pemprosesan Syabu yang mengandungi dadah berbahaya jenis Methamphetamine serta telah menghasilkan sebanyak 158 kg dalam 2 reaktor berasingan manakala 2 reaktor lagi dalam proses pencucian semula.
- (3) ...

- (4) Bahawa kamu mendapat bekalan bahan-bahan kimia serta mesin-mesin bagi pemprosesan Syabu yang mengandungi dadah berbahaya jenis Methamphetamine dari Negara Filipina dan Negara China yang dibawa masuk melalui pelabuhan Pulau Pinang.

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[42] At the trial SD7 candidly and unequivocally admitted to these statements of fact. This admission is of great significance as it provides proof that he was the mastermind and the brain behind the illegal activities at the factory since April 2006 up until 8 July 2006. It was here that he seriously undermined his credibility when he claimed that he only knew that the factory was processing methamphetamine when he was arrested on 9 July 2006, the date the three appellants were arrested together with the three others. A blatant lie on a crucial point such as this could not but destroy his credibility as a witness.

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[43] When asked in cross-examination by the learned DPP what his activity was at home since he claimed that he had health problems and was spending most of his time either at home or at the hospital, SD7's answer was 'saya menonton televisyen dan melayari internet'. He was quick to explain though that he also attended to the factory's operations in order to generate profit for the company, probably to back up his claim that he knew the goings on in the factory well enough to be able to confirm that the six accused were not aware that they were manufacturing syabu at the factory.

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[44] In view of SD7's deep involvement in the factory's clandestine operation and the nature of his relationship with the first appellant, it is only natural that he would try to save his proxy the first appellant and his two children from the fatal consequences of their involvement in this illegal activity. Under these circumstances the learned trial judge was on solid ground when he found SD7 to be an unreliable witness, made worse by his negative demeanour while giving evidence.

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[45] The last issue raised under the first ground of appeal is that the learned trial judge failed to consider the cautioned statements of the appellants. This is only partly true as only the second and third appellants produced their cautioned statements. The first appellant did not produce any statement as evidence. We agree that the learned trial judge did not consider the cautioned statements of the second and third appellants but we do not find the omission to be fatal because even if the learned trial judge had considered the statements he would have arrived at the same verdict of guilty. It is clear that on at least one material issue, what they said in their cautioned statements and what they said in court was contradictory and irreconcilable.

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[46] The question of who owned and managed the factory is a material issue

- A as it had a bearing on the question whether they knew they were producing drugs at the factory. In his testimony in court the second appellant claimed that the factory belonged to 'Uncle Hooi'. This not only contradicted his own testimony given seconds earlier when he said he was not sure who owned the factory but more seriously it contradicted his cautioned statement (D288)
- B when he said in no uncertain terms that the factory belonged to his father the first appellant.

- C [47] There is no evidence that 'Uncle Hooi' refers to SD7. Further, in his evidence in court he denied mixing chemicals at the factory as his job according to him was to operate the forklift, clean the drums and tidy up the factory. Yet in his cautioned statement he said he did, except that he was not very good at it.

- D [48] The same goes with the third appellant. In her cautioned statement (D290) she confirmed that the factory belonged to her father but in her evidence in court she said the factory belonged to 'Uncle Ooi'. It is obvious that this character, even if he exists had nothing to do with the factory as his name does not even appear in the SSM document at D280. With such serious discrepancy on such a material issue, it is highly unlikely that the learned trial judge would have decided differently on the issue of their knowledge as to the factory's clandestine activities.
- E

- F [49] At the risk of being repetitive it needs to be emphasised that the appellants' defence was that they did not know they were processing drugs at the factory as they thought they were manufacturing some other products unrelated to drug. It was not their case, it will be noted, that the factory was not used as a drug processing laboratory or that they were not processing anything at the factory.

- G [50] Thus, the question of fact that the learned trial judge had to consider was simple: did the appellants know that they were processing drugs and not some other products? The fact that the factory was used as an illegal laboratory to process methamphetamine was not in issue as the chemist's evidence was not challenged, nor had another expert been called to contradict his finding. Nor
- H has any challenge been made as to the nature of the drugs.

- I [51] Knowledge is a matter to be established either by direct evidence or by way of inference. Either way it is purely a question of fact for the learned trial judge to determine. If he had believed the appellants' explanation that they had no knowledge or had a lingering doubt in his mind as to their guilt, the appellants would have been acquitted along with the other three accused.

- [52] As it was, the learned trial judge found it to be improbable that the three

appellants did not know that they were producing methamphetamine. He had given his reasons for arriving at such finding, among them the fact that the first appellant was a director of the company while the second and third appellants were shareholders cum workers in the factory. This is over and on top of the fact that traces of methamphetamine were found on their fingernails, hair and clothing. The presence of this drug on their persons cannot be a mere coincidence having regard to the totality of the evidence and the probabilities of the case. This evidence provides the nexus between the appellants and the preparatory act of processing methamphetamine in the factory.

[53] Then there is the admission by the defence own witness SD7 that the statements of fact referred to in para 41 above are true, which confirms beyond peradventure that the factory was used as a drug processing laboratory, specifically to produce methamphetamine. Lest we forget we are not here dealing with just a few grams of methamphetamine but 368,126.26g of the drug. A mere 50g of this drug would trigger the presumption of trafficking under s 37(da) of the DDA and thus the extreme penalty of death.

[54] With all these hard evidence before the court, it is unrealistic to expect the learned trial judge to give credence to the appellants' claim that they did not know they were processing methamphetamine. As the finding is based on actual evidence before the court, it would be wrong for us to interfere with the finding in the absence of any serious error of law by the learned trial judge resulting in a substantial miscarriage of justice. We therefore find the first ground of appeal to be without merit.

[55] As for the second ground of appeal the complaint is that the learned trial judge erred in failing to draw adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 ('the Act') for failing to call Tan Seong Hooi (SD7) at the prosecution stage of the case. Section 114 Illustration (g) of the Act provides as follows:

The court may presume —

(g) that evidence which could and is not produced would if produced be unfavourable to the person who withholds it;

[56] By virtue of the word 'may' in the provision it is clearly not a mandatory requirement that every time the prosecution fails to call a witness, an adverse inference ought to be drawn against them. It is only when the prosecution withholds or suppresses material evidence that the inference may be drawn. Even then the unfavourable inference to be drawn is to be confined to the particular evidence that is withheld or suppressed. It cannot extend to the whole length and breadth of the prosecution case unless it relates to an essential element of the charge resulting in a total collapse of the prosecution case. What

A the adverse inference is must therefore be identified before it can be drawn.

[57] The presumption under s 114(g) of the Act has been the subject of numerous judicial pronouncements. For purposes of this judgment we think it apt to refer to the then Supreme Court decision in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 where Mohamed Azmi SCJ (as he then was) delivering the judgment of the court said at p 494:

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It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limits. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document but material document by a party in possession, or for non-production of not just any witness but an important and material witness to the case.

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D [58] The appellants' case is that in failing to call SD7 as its witness, the prosecution's intention was to suppress material evidence without stating what the material evidence was that the prosecution was suppressing. We do not find any basis for the allegation. In the first place SD7 was not an essential witness to the unfolding of the narratives on which the prosecution case was based: *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1. He was not even present at the factory when the appellants were arrested. The fact that he was the mastermind behind the factory's illegal activity does not absolve the appellants of culpability if otherwise they were part of a grand design to produce illegal drugs at the factory.

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[59] Further, even without SD7's evidence the prosecution already had sufficient evidence to establish a prima facie case against all the appellants. Thus the failure to call him as a prosecution witness is of no consequence as it did not result in a gap in the prosecution case. It is trite law that an adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden. As Yong Pung How CJ said in *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510 at pp 523–524:

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The appellant's contention is that the failure of the prosecution to adduce evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that is there were no such visits.

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Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case. Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all the rest should be called, nor

why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

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[60] As the burden of proof lies with the prosecution, it is entirely for the prosecution to decide whom to call and whom not to call as a witness subject of course to its overriding duty to conduct the prosecution with utmost candour and fairness. If the prosecution knows that a particular witness from whom a statement has been recorded has not told the truth, will not tell the truth and will in fact lie to the court, there is no point in calling such witness. In fact to do so would be to pervert the course of justice.

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[61] As for the prosecution's failure to offer SD7 to the defence at the close of its case, we do not think this is a ground for drawing adverse inference under s 114(g) of the Act. In the first place SD7 was available and in fact called by the defence in support of the appellants' case. The nature of his evidence when he was eventually called to give evidence for the defence perhaps explains why the prosecution decided not to call him as a witness. They must have anticipated that he would be a trojan horse. The second ground of appeal must therefore fail.

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[62] The third and final ground of appeal is that there were doubts on the identity of the drug exhibits. The basis of the complaint is that the gross weight of the drugs as specified in the charge appearing at p 2 (vol 1) of the cross-appeal record was 184.5kg, ie 184,500g but by the time they reached the chemist the weight had ballooned to 368,126.26g.

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[63] Our first observation with regard to this issue is that the discrepancy is not between the evidence of witnesses but between the weight as determined by the chemist and the weight mentioned in the charge sheet that was produced before the magistrates court. Obviously this proceeding before the magistrates court was prior to the appellants being formally charged in the High Court for the present offence.

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[64] In this regard we take judicial notice of the fact that for offences of this nature no plea would be taken in the magistrates court. The point to note here is that the gross weight of 184.5kg was not the gross weight as determined by the chemist. This is undisputed and can be discerned from the fact that the charge sheet is dated 27 July 2006 whereas the chemist report is dated 2 October 2006.

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[65] Secondly, it was also not the weight as determined by any of the police witnesses as none of them actually mentioned this weight in their evidence. SP15's evidence was merely to the effect that he weighed the exhibits 'seara

A kasar' without saying what the gross weight was and whether they included all the drug exhibits that were seized.

B [66] In a recent decision of the Federal Court in *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 it was decided that the act of weighing the drugs by the police was an 'exercise that was not necessary'. This is what Richard Malanjum CJ (Sabah and Sarawak) delivering the judgment of the court said at para 48:

C [48] The person who seized the drug exhibit and other items from the appellant was SP1. Before passing the same to SP7 he marked the items seized and he also weighed the drug exhibit, *an exercise that was not necessary for him to do. As such the weight he obtained was also immaterial*. Thus, there was no necessity for him to explain on the discrepancy between the weight he obtained and the weight obtained by SP3. Nevertheless, the use of uncalibrated weighing machine easily explained for the weight discrepancy. (Emphasis added.)

D [67] Thirdly, this is not the usual case where all the exhibits seized by the police were weighed by them to determine the estimated gross weight and then kept in their custody before sending them to the chemist for analysis. In this case the chemist himself had gone to the factory, determined for himself the weight of the drugs and took samples for analysis and it took him six days to carry out the inspection. His evidence it will be recalled is that the substances that he found and analysed at the factory contained the drug methamphetamine weighing 368,126.26g and there was no challenge at all to this evidence.

E [68] Fourthly, whatever may have been the basis for specifying the weight to be 184.5kg in the preliminary charge sheet, it is clear that it was not the weight that had been sanctioned by the public prosecutor as the consent to prosecute was only issued on 12 June 2007 as can be seen in exh P1 at p 685 of the cross-appeal record (vol 3).

F [69] Section 39B(3) of the DDA clearly provides that no prosecution under s 39B shall be instituted except by or with the consent of the public prosecutor. In short the 184.5kg was not the weight that the public prosecutor had decided would form the basis and subject matter of the charge, which obviously could only be determined after receiving the chemist report.

G [70] In any event what is of critical importance is whether the drug exhibits produced in court were the same drug exhibits recovered from the factory. This is a question of fact and not of law. The question of law is what is the effect of the discrepancy. In *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345, the Federal Court was once again called upon to decide on the issue of discrepancy in the weight of the drugs weighed by the chemist and

the weight as found by the investigating officer. Raus Sharif FCJ (now PCA) in delivering the judgment of the court held at p 266 (MLJ); p 352 (CLJ):

It can be seen from the above that there was no break in the chain of evidence regarding the exhibits. Thus, on the facts of this case, *the difference in the weight of the exhibits as found by the police and the chemist, by itself cannot be said to have created doubt as to the identity of the exhibits*. The real question is whether the exhibits recovered by the police is the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence. We have no doubt that it was the same exhibits. (Emphasis added)

[71] The same point was reiterated in *Lew Wai Loon* where the court said at para 27:

[27] Accordingly in the present case, we would say that discrepancies in weight alone of an exhibit such as drug should not *ipso facto* cast doubt on its identity. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. One fact and/or event to consider is whether there is any break in the handling or custody, which tantamount to a break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence. (See: *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75; [1979] 1 LNS 100; *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168; [1974] 1 LNS 33).

[72] In the present case the combined evidence of SP6, SP7 and SP15 shows beyond any reasonable doubt that the drug exhibits that SP6 found to be 368,126.26g of methamphetamine were the same drug exhibits that were seized from the factory. There was no challenge to their evidence in cross examination and no reason was given as to why this was not done. Their evidence could not therefore be disputed: *Wong Swee Chin*. Such being the case the appellants cannot now be heard to say that there had been a break in the chain of evidence relating to the exhibits. The only form of challenge was by way of the following question in the cross-examination of SP15 at p 246 of the appeal record:

Q: Barang kes dadah dalam kes ini bukanlah dalam rampasan dadah oleh DSP Howe kepada kamu?

A: Tidak setuju.

[73] We do not consider this to be an effective challenge to SP15's evidence on the identity of the exhibits. In any case the suggestion was flatly denied by SP15. What is implied in the question is that the exhibits were not the same exhibits that DSP Howe Sye Eng (SP7) seized and handed over to SP15. But strangely SP7 himself who was the officer who seized and marked the exhibits was not cross examined at all on this material allegation.

A [74] It is therefore untenable for learned counsel to now question the identity of the exhibits on the ground that the weight mentioned in the preliminary charge is different from the weight as finally determined by the chemist and which formed the subject matter of the charge against the appellants, which is 368,126.26g of methamphetamine.

B [75] Further, as mentioned in para 13 above what is important in a charge under s 39B(1)(c) is the preparatory act itself. In the present case the circumstantial evidence points unerringly to the fact that the common intention of the appellants was to do such act, ie to prepare the drugs for the purpose of trafficking. As to what in law constitutes common intention, we are guided by the principle laid down by the Privy Council in *Mahbub Shah v Emperor* AIR 1945 PC 118 where it was held as follows:

D Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

G [76] This principle has been consistently applied by our courts. On the evidence the only reasonable inference that will account for all the proved facts is that the appellants had common intention to prepare the drugs for the purpose of trafficking within the meaning of s 39B(1)(c) of the DDA read with s 34 of the Penal Code. The evidence though circumstantial is inconsistent with any other hypothesis than the guilt of the appellants. For these reasons we dismiss the appeal and affirm the conviction and sentence.

H *Appeal dismissed and conviction and sentence affirmed.*

Reported by Kanesh Sundrum

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